

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 77

Docket No. SF-0353-09-0549-C-1

**Phan V. Tram,
Appellant,
v.
United States Postal Service,
Agency.**

September 27, 2013

Richard Heavey, Esquire, Medfield, Massachusetts, for the appellant.

Catherine V. Meek, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that denied her petition for enforcement of a Board order. For the following reasons, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still denying the petition for enforcement.

BACKGROUND

¶2 As part of its National Reassessment Process 2 Pilot Program, the agency informed the appellant on April 9, 2009, that it was not able to identify operationally necessary tasks within her medical restrictions, and that she should

therefore not report for duty. *Tram v. U.S. Postal Service*, [114 M.S.P.R. 413](#), ¶ 2 (2010). After the appellant filed a restoration appeal, the Board held that it had jurisdiction over the appeal because the appellant made nonfrivolous allegations that she was absent from her position due to a compensable injury, she recovered sufficiently to return to duty on a part-time basis or return to work in a position with less demanding physical requirements than those previously required of her, the agency denied her request for restoration, and the denial was arbitrary and capricious. *Id.*, ¶¶ 4, 7-10. The Board remanded the case for adjudication on the merits, specifically for development of the record on the issue of whether the local commuting area encompassed areas outside the Sierra Coastal District, and whether the agency searched the entire commuting area. *Id.*, ¶¶ 10-11, 14.

¶3 On remand, the administrative judge reversed the denial of restoration, and ordered the agency to reinstate the appellant retroactive to April 9, 2009, and award her appropriate back pay and benefits. *Tram v. U.S. Postal Service*, [118 M.S.P.R. 388](#), ¶ 5 (2012). The Board granted the agency's petition for review of that initial decision, held that retroactive restoration was not the appropriate status quo ante remedy, and ordered the agency to conduct a proper job search retroactive to April 9, 2009, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under [5 C.F.R. § 353.301](#)(d). *Id.*, ¶¶ 1, 8, 11.

¶4 After the appellant filed a petition for enforcement of that final Board order, Compliance File (CF), Tab 1, the administrative judge denied the appellant's petition for enforcement, CF, Tab 13. The administrative judge found that the agency submitted declarations from the district assessment team leaders for the districts within the appellant's local commuting area, and that those declarations indicated that the team leaders reviewed the existing documentation of necessary work, compared it to the appellant's restrictions, and were unable to identify any work within her restrictions. *Id.* at 6-7. Thus, the administrative judge found that the agency proved that it complied with the Board's order. *Id.* at 6, 8. The

administrative judge also noted that the agency notified the appellant that it had decided to pay her back pay, interest, and other benefits for the period from April 9, 2009, until December 24, 2009, and was awaiting her completion and submission of the forms needed to process the payment. *Id.* at 6; *see* CF, Tab 10.* The administrative judge rejected the appellant's claim that she was entitled to back pay through her January 2013 return to duty. CF, Tab 13 at 7.

ANALYSIS

¶5 The appellant asserts on review that the administrative judge did not address evidence of available work within the appellant's restrictions as of April 9, 2009. Petition for Review (PFR) File, Tab 1 at 5-7. In this regard, the appellant submitted several Necessary Work Identification Worksheets reflecting available mail casing assignments at facilities within her local commuting area, and asserted that she had been manually casing mail for 8 hours per day before she was sent home on April 9, 2009. *Id.* at 6; *see* CF, Tab 1, Ex. C.

¶6 An administrative judge's failure to mention all of the evidence of record does not mean that she did not consider it in reaching her decision. *See Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). In any event, the record reflects that the appellant's physical restrictions due to her carpal tunnel syndrome included no fine manipulation. CF, Tab 5 at 13. The record also reflects that casing mail requires fine manipulation. *Id.* at 41-42. Although the appellant contends that she worked outside those restrictions before April 9, 2009, the fact that she may have done so did not obligate the agency to restore her in a manner that would

* The agency indicated below that, while it believed that it had fully complied with the Board's order to conduct a search for available work, it had nevertheless decided to pay the appellant back pay, interest, and other benefits from April 9, 2009, through December 24, 2009. CF, Tab 10. We find that the agency's decision to provide such pay and benefits does not constitute a concession, as alleged by the appellant, that the agency did not conduct a proper search in compliance with the Board's order.

have violated the restrictions imposed by her doctor. *See Paszko v. U.S. Postal Service*, [119 M.S.P.R. 207](#), ¶¶ 7, 9 (2013) (an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area); *Chen v. U.S. Postal Service*, [114 M.S.P.R. 292](#), ¶ 7 (2010) (same). The agency's regulatory obligation to make every effort to restore the appellant to a position within her medical restrictions cannot be overridden by the appellant's apparent performance of work outside her medical restrictions.

¶7 The appellant also asserts that the administrative judge should have verified the accuracy of the declarations provided by the district assessment team leaders who averred that they reviewed the documentation concerning available work and determined that there was no work available within the appellant's restrictions. PFR File, Tab 1 at 7. The appellant contends that the administrative judge should have compelled the agency to produce the documents upon which the district assessment team leaders relied. *Id.*

¶8 A declaration subscribed as true under penalty of perjury, if uncontested, proves the facts it asserts. *Woodall v. Federal Energy Regulatory Commission*, [30 M.S.P.R. 271](#), 273 (1986). Here, the district assessment team leaders averred that: (1) They maintained all records involving the National Reassessment Process and searches for available work for employees with compensable injuries within their districts; (2) the worksheets submitted by each facility within the district were maintained in a master file; and (3) the district assessment team, in response to the Board's order, conducted a search for available work for the appellant using those worksheets and the appellant's medical restrictions, but no such work was available. CF, Tab 5 at 7-8, 14-15, 23-24, 32-33. Although the appellant asserts that the declarations are insufficient, she has not presented credible evidence contradicting them. The agency must prove compliance with the Board's order. *See Payne v. U.S. Postal Service*, [82 M.S.P.R. 298](#), ¶ 8 (1999). Here, the declarations in question establish that there was no work available within the appellant's restrictions. *Cf. Cerilli v. Office of Personnel*

Management, [119 M.S.P.R. 404](#), ¶ 7 (2013) (the Office of Personnel Management (OPM) may establish by preponderant evidence that it sent a statutorily-required notice by submitting the affidavit of the official responsible for printing and distributing retirement forms and notices, which discusses how notices were prepared and averring that general notices regarding survivor elections were sent to all annuitants; once OPM met this requirement, the burden of going forward fell upon the appellant, who must put forth credible evidence supporting his contention that he did not receive the notice).

¶9 Finally, the appellant asserts that she is entitled to back pay from December 24, 2009, until her return to duty in January 2013, because the administrative judge incorrectly found that the agency conducted a legally sufficient job search of the local commuting area on December 24, 2009, and in June 2010. PFR File, Tab 1 at 10-12. The appellant claims that whether the agency conducted legally sufficient searches on or after December 2009 was not litigated in her prior appeal, and that the administrative judge's finding contradicts her findings in an earlier initial decision. *Id.* at 10-11.

¶10 The Board's order in this case required the agency to conduct a proper job search "retroactive to April 9, 2009, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under [5 C.F.R. § 353.301](#)(d)." *Tram*, [118 M.S.P.R. 388](#), ¶ 11. In reaching this conclusion, the Board held that in cases where the denial of restoration was arbitrary and capricious for lack of a proper job search, the appropriate remedy is for the agency to conduct an appropriate search within the local commuting area "retroactive to . . . the date of the appellant's request for restoration, and to consider her for any suitable vacancies." *Id.*, ¶ 10. The Board noted that this remedy would be sufficient to correct the wrongful action and substitute it with a correct one based on an appropriate search, but would not put the appellant in a better position than the one she was in before the wrongful action occurred because it left open the possibility that the agency might still be

unable to find an appropriate assignment “available as of April 9, 2009.” *Id.*; *see Tram*, [118 M.S.P.R. 388](#), ¶ 10 n.2 (the results of a later job search were insufficient to demonstrate that there was no work available “on April 9, 2009”). Thus, the denial of restoration at issue throughout this case has been the denial that took place on April 9, 2009, when the agency instructed the appellant not to report for duty in her modified position manually casing letter mail. *See Tram*, [118 M.S.P.R. 388](#), ¶¶ 2-3, 5, 9 (2012); *Tram*, [114 M.S.P.R. 413](#), ¶¶ 2-3; *Brehmer v. U.S. Postal Service*, [106 M.S.P.R. 463](#), ¶ 9 (2007) (the rescission of restoration rights that were previously granted may constitute a denial of restoration within the meaning of [5 C.F.R. § 353.304\(c\)](#)). The question has been whether that denial was arbitrary and capricious. *See Tram*, [118 M.S.P.R. 388](#), ¶ 9; *Tram*, [114 M.S.P.R. 413](#), ¶¶ 10-11. As the administrative judge found, the agency established that there was no work available within the appellant’s restrictions during the April 9, 2009 time period. Thus, we find that the agency has proven its compliance with the Board’s order, and the appellant has not shown that the agency is obligated to pay her back pay until her return to duty in January 2013.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.